MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket Number Oxf 21-412

J.P. Morgan Acquisition Corp.

Plaintiff-Appellant

v.

Camille J. Moulton

Defendant-Appellee

ON APPEAL FROM SOUTH PARIS DISTRICT COURT

Superior Court Docket No. SOPDC-RE-19-02

APPELLANT'S BRIEF
with REVISED APPENDIX CITE REFERENCES

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A. STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. On March 18, 2009, Defendant borrowed $62,985.00 memorialized by a 30 year note (A. 47), and secured by a Mortgage upon her home at 52 Morrill St., Buckfield, ME (A. 50).

2. Defendant stopped paying her mortgage after making a partial payment on November 18, 2016, credited to the payment due on September 1, 2016. (A. 44)

3. Plaintiff mailed, and Defendant received a 14 M.R.S. §6111 Notice of Default and Opportunity to Cure dated November 22, 2018 (A. 67-72).

4. Plaintiff filed the instant foreclosure case on January 24, 2019 (A. 1) in which ownership of the Mortgage was based upon a Quitclaim Assignment (A. 66)

6. On February 5, 2019, the defendant filed a form responsive pleading with no counterclaim, including a request for mediation. (A. 1-2, and 98)

7. Mediation proved unsuccessful, resulting in the foreclosure case being returned to the docket on August 21, 2019 when a scheduling order issued. (A. 4)

8. Plaintiff timely filed its Witness and Exhibits list on November 14, 2019, including designating the defendant as a witness, ultimately requesting 90 days to schedule the appearance of its witness (who resided out of state). (A. 4 and 99)

9. Several stays and continuances were granted beginning in 2020 because of CARES act moratoria. (A. 4-5)

10. On August 23, 2021, following the expiration of the final moratorium, but before the September 30, 2021 deadline for the setting of new dates, Plaintiff filed a Motion to Dismiss without prejudice. The Motion was not docketed at that time. (A. 5 and 25)

11. On September 13, 2021, Counsel for the defendant appeared (A. 5); opposing the Motion to Dismiss (A. 83), filing a Witness and Exhibit List including designating the defendant as a witness (A. 101), and filing a Motion for Summary Judgment (A. 26).

12. The sole claim of Defendant's Motion for Summary Judgment was that the contents of the 14 M.R.S. §6111 Notice (A. 67) failed to comply with statutory requirements (A. 29).

13. Plaintiff opposed the Summary Judgment, but did not file a Cross-Motion. The opposition requested only that Plaintiff's Motion be denied. (A. 73)

14. On November 24, 2021, without further hearing, Plaintiff's Motion to Dismiss was DENIED (A. 9-11), and Defendant's Motion for Summary Judgment was GRANTED (A. 12-20).

15. The Order GRANTING the Summary Judgment Motion contained a DECREE that Defendant "holds title to the real property at issue unencumbered by the mortgage and promissory note". (A. 20)

16. Plaintiff timely appealed.

B. ISSUES PRESENTED AND STANDARD OF REVIEW

1) Did the trial court err in granting the Summary Judgment?

a) Was the 6111 Notice fatally flawed as a matter of law given the admitted accuracy of the figures and arithmetic contained in the Notice and its accompanying itemization?

b) Did the contents of the Notice of Default, and the context within which it may or may not have been read, understood and acted upon by the borrower present an issue of fact which should have precluded summary judgment?

STANDARD OF REVIEW: DE NOVO

2) In absence of a counterclaim, or any collateral action requesting declaratory relief, was the trial Court's DECREE that Defendant holds title to the real property unencumbered by the mortgage error?

STANDARD OF REVIEW: ABUSE OF DISCRETION

3) Did the trial court err in its sua sponte consideration of standing? Was the failure to afford Plaintiff notice, an opportunity to be heard or submit evidence on the matter before issuing the ruling; or the failure to dismiss the matter without prejudice once having made the finding regarding standing?

STANDARD OF REVIEW: ABUSE OF DISCRETION

C. SUMMARY OF ARGUMENT

1) The trial court erred in granting Summary Judgment because the November 22, 2018 Notice of Default and Opportunity to Cure, although not perfect, was not fatally flawed as a matter of law, and generated a triable issue of fact regarding its content and how and whether defendant read or acted upon it.

2) The trial court erred by awarding defendant with a decree that she holds title to the mortgaged property free and clear, as there was no counterclaim, no concurrent action, no collateral action, and no "second" action in which Defendant made any affirmative claim.

3) The trial court, without notice to Plaintiff, without allowing further hearing, and without allowing Plaintiff to produce evidence issued *sua sponte* findings that Plaintiff lacked standing to foreclose. Defendant never objected to Plaintiff's standing, and it was not part of the MSJ.

4) Even if the trial court was correct about Plaintiff's lack of standing, having found no sanctionable conduct, the Court was compelled to *grant* the then pending Motion for Dismissal *without prejudice* (with conditions), or to enter its own Dismissal without prejudice (with conditions) rather than to deny the Motion to Dismiss and grant Summary Judgment.

D. ARGUMENT

1. THE GRANTING OF THE SUMMARY JUDGMENT WAS ERROR

A. STANDARD OF REVIEW – DE NOVO

This is an appeal of the granting of a Motion for Summary Judgment (hereinafter, "MSJ"). There is no dispute that the standard of review in this matter is non-deferential, *de novo* review.

"We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the *nonmoving party* to determine "whether the parties' statements of material facts and the referenced record evidence reveal a genuine issue of material fact." *JPMorgan Chase Bank v. Harp,* 2011 ME 5, ¶ 15, 10 A.3d 718. "In so doing, we consider only the material facts set forth, and the portions of the record referred to, in the statements of material facts. *Salem Capital Grp., LLC v. Litchfield,* 2010 ME 49, ¶ 4, 997 A.2d 720. Further, "[a]mbiguities regarding the existence of a genuine issue of material fact must be resolved in favor of the *non-moving party*, and thus left for **the fact-finder** to decide. (citation omitted, emphasis added)

Pushard v. Bank of America, N.A., 2017 ME 230 ¶ 13, 175 A.3d 103 similarly states that the reviewing Court must consider "the properly presented evidence and any reasonable inferences that may be drawn therefrom in the light most favorable to the *nonprevailing* party, in order to determine whether there is a genuine issue of material fact and whether ***any*** party is entitled to a judgment as a matter of law." (citation omitted, emphasis added)

B. THE CONTENTS OF THE NOTICE OF DEFAULT, PRESENTED, AT MINIMUM, A TRIABLE ISSUE

The sole issue in Defendant's MSJ was that the Notice of Default and Opportunity to Cure (A. 67) validly mailed and received was not in compliance with statutory requirements in 14 M.R.S. § 6111 (1-A)(B) and (C). (A. 28).

What are the statutory requirements of such a notice? 14 M.R.S. § 6111 (1-A) (B) calls for the notice to include "An itemization of all past due amounts causing the loan to be in default and the total amount due to cure the default". 14 M.R.S. §6111 (1-A) (C) calls for, "An itemization of any other charges that must be paid in order to cure the default.

The Notice (A. 67) does state the total amount causing the loan to be in default, with an attached itemization of charges. The unprecedented occurrence giving rise to the issue presented here (which should have been presented to a trier of fact) is that one of the line items in the accompanying (and required) itemization was a **credit**. When applied, as Plaintiff did *within* the Notice, the itemized total was ***reduced.***

As discussed below, and as admitted by Defendant, the gross amount outstanding causing the default was, in fact, **$20,930.04**. The itemization page includes what was admitted to have been a correctly calculated credit of $672.38,[1] and *subtracts* that credit amount from the gross past due amount, leaving the remainder of **$20,257.66** as the amount required as due. As expanded upon below, all figures and computations were correct.

The "elephant" in the Notice is that the figure on the cover page, and the remainder (after the credit was applied) in the referenced (and statutorily required) itemization are different. Is

[1] Bearing the reference, "**less** funds in unapplied"

that *per se* fatal as a matter of law, with all inferences and all ambiguities *necessarily* resolved in Plaintiff's favor?

The fair and rational answer in this case is, "not necessarily", let's let the case go to trial and see."

The following from the trial court's ruling discusses what defendant might have thought and why (A. 18).

> There is no evidence submitted with Plaintiff's opposition or reply showing that the Lender made Defendant aware that her November 2016 payment was not straightforwardly applied to the October 2016 periodic payment, but rather that the bulk of it was withheld in a "suspense balance credit" (Pl.'s Opp'n, at 2-3; Pl.'s Add. S.M.F.16 or "funds in unapplied" (see Notice, Def.'s Ex. C, at 5; Pl.'s Ex. 3, at 5). It is unclear on this record how Defendant would have known that her November 2016 payment had not been fully applied to the October 2016 arrearage, but instead partially applied to September 2016 with the majority remainder held in suspense, and therefore she should have known that she would have to pay the "total amount due" in the attached Itemization and not the "total amount to cure the default" indicated on the face of the Notice.

It appears clear that the trial judge thought the defendant's knowledge and state of mind had relevance. Respectfully, this

alone would seem to preclude the granting of Defendant's MSJ. Here, the crediting *was admitted to have been done correctly pursuant to the terms of the mortgage,* as specified below.

Noteworthy were Defendant's *admissions* of Plaintiff's Statement of Additional Material Facts Nos. 13-20 (A. 43-45) that she had made a short payment, that the short payment was handled correctly pursuant to the terms of the mortgage, leaving a suspense balance, that when the Notice was sent the amount in default *included* both the October 2016 and November 2016 payments, that crediting the suspense balance as was done in the itemization lowered the past due amount from $20,930.04 to the amount due listed at the bottom of the itemization, $20,257.66.

Both figures were correct in the end, one constituted the gross default, and the other was the resulting "net" after application of the number explained as a credit.

It is also noteworthy that despite having had at least two opportunities to do so, Defendant declined to aver to the matter of what she thought, whether she read what the notice said, whether she tendered, or would have tendered *anything* towards her two-plus year arrearage, or even whether she opened the notice at all.

Respectfully, whether Defendant opened the Notice, read the Notice, thought about the Notice, was confused by the Notice, threw the Notice away, would have paid something, or attempted to pay something would certainly presented at least a triable issue of fact.

C. THE "STRICT COMPLIANCE" CASE NOTICE OF DEFAULT DEFICIENCIES ARE DISTINGUISHABLE

A survey of the most often cited cases from which the need for "strict compliance" are derived all feature reliably quotable language, but each error cited in those cases is very different from the situation before this Court today.

Here are the cases cited by Defendant and the Court in which a §6111 Notice was found to be fatally flawed, listed with the corresponding error, each of which is distinguishable:

In Bank of Am., N.A. v. Greenleaf (Greenleaf I), 2014 ME 89 ¶29, 96 A.3d 700, the amount was not "frozen". It required the borrower to call to find out what other charges would (by definition within the statement) come due within the 35 day cure period. The judgment for the defendant followed a **trial**.

JP Morgan Chase Bank, N.A. v. Lowell, 156 A.3d 727 ¶18, 19, 2017 ME 32 the notice in question cautioned that additional

amounts advanced for escrows might also become due and be necessary to cure the default, which is not the case here. The judgment for the defendant followed a **trial**.

Wells Fargo Bank, NA. v. Girouard, 2015 ME 116 ¶9, 123 A.3d 216 upon which the trial court mistakenly relied[2] actually involved an *agreed upon* deficient notice without elaboration as to what the defect might have been. This case did involve a Summary Judgment, but is not germane to the Notice issue in this case.

Camden Nat'l Bank v. Peterson, 2008 ME 85,121, 948 A.2d 125 reversed a summary judgment based upon finding that a question of fact existed concerning whether the proof of mailing of an otherwise valid notice fulfilled mailing and service requirements of § 6111.

United States Bank Trust, NA. v. Jones, 330 F. Supp. 3d 530 (D. Me. 2018), aff'd, 925 F.3d 534 (1st Cir. 2019) referenced further below, involved an unambiguously demanded $2638.32 found by Judge Woodcock **at trial** to have been an overcharge. Here,

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[2] *Girouard id.* was mentioned by the trial court within a section of its ruling containing footnote 7 which repeatedly referred **to Plaintiff** seeking, and not carrying the burden of summary judgment (which the record indicates was *never* sought) Please see A. 18-19

however, there are no overcharges, and no mathematical or computation issues. BOTH the gross figure and the net figure were correct once the credit was applied.

None of the foreclosure cases comprising this ample body of post-trial and post-summary judgment jurisprudence dealt with a situation involving the effect of a *credit subtracting from an accurate set of figures.*

Though, each and all of the cases cited by Defendant and the trial court refer to "strictness" of compliance, and that the monetary amounts alleged to be due via the §6111 notice not increase during the 35 days (be precise and frozen), **none** compels the result sought and obtained in the trial court.

D. THE STANDARD AT ISSUE IS COMPLIANCE, NOT PERFECTION

Despite the "strictness and severity" of foreclosure litigation and compliance with procedures; nowhere is there a case that parses out what exactly is meant when we are instructed that a validly served §6111 must be "in compliance with statutory guidelines". Notices without significant error, with the correct arithmetic solution within required there for the subtracting must

at least merit a trial on this record. Although stringent, nowhere is the standard defined as **perfection.**

Judge Woodcock's Opinion in *Jones*, supra, at p. 537-538 in which he quotes this Court's opinion in F*ed. Nat'l Mortg. Ass'n v. Deschaine,* 2017 ME 190, ¶ 34, 170 A.3d 230 in discussing "blocking of a lender's foreclosure based upon a mathematical or accounting error being harsh"[3] recognized the reality that few litigated cases will contain easy to spot, significant errors as did the *Jones* matter.

Mindful of what has evolved into the "all-or-nothing" state of foreclosure litigation despite its historical basis in equity; Judge Woodcock wrote:

> The Maine Supreme Judicial Court instructs that § 6111's requirement that notices include "the precise amount" a borrower must pay "is strictly enforced." *JPMorgan Chase Bank, N.A. v. Low*ell, 2017 ME 32, ¶ 13, 156 A.3d 727.
>
> Maine's courts might adopt a de minimis or harmless error exception in the future, but the Court need not guess at that possibility in this case. In Lowell, the Maine Supreme Judicial Court found a demand letter defective because a reader could have interpreted its language as requiring a

[3] This passage was quoted at length by the trial court. (A. 17).

payment that was $2,267 more than actually required in order to cure the borrower's default. Lowell, 2017 ME 32, ¶¶ 19-21, 156 A.3d 727. Here, U.S. Bank's inclusion of the fee was unambiguous, and its overstatement was roughly $400 more than JPMorgan's in *Lowell*.[4]

As we view how the correctly calculated figures were communicated in this Notice, do we not need the Defendant (and presumed reader) in order to determine, as an issue of fact, what was understood? If the less than perfect depiction of the two figures within the Notice were deemed an error, would not that error fall on the *de minimus* side of the *de minimus* spectrum?

Very few things in the law are absolutely binary. In this context, this notice, and how the credit was applied should not be one of them. This case is certainly one that begs the question of whether it is time to consider if "strict compliance" **must mean perfection** and not tolerate or allow even a *de minimus* error, especially one where the math is actually *right.*

[4] The inclusion of impounds "to become due" in the amount demanded distinguishes that case from this given the single, net amount sought.

Given the stakes set by this Court in *Fannie Mae v. Deschaine*, 170 A.3d 230 (Me. 2017) and *Pushard v. Bank of America, N.A.*, 175 A.3d 103 (Me. 2017) in this and every foreclosure case (no matter how long the arrearage), deeming this gross v. net itemization fatal *as a matter of law*, would lead to the kind of absurd result abhorred by judges and scholars in the area of statutory construction, especially in a suit sounding in equity.

If affirming this summary judgment based on the computation of this credit is even contemplated, then this might just be the time to consider Judge Woodcock's "suggestion", which might well be interpreted as just permitting concepts of context and equity to add a bit of gray into a domain now dominated by black and white.

The Grant of the Summary Judgment should be reversed and the trial permitted to proceed.

2. THE TRIAL COURT'S TITLE DECREE WAS ERROR

STANDARD OF REVIEW – ABUSE OF DISCRETION

A. The record in this case discloses no counterclaim, nor any independent or consolidated action in which Defendant herein has sought any affirmative relief as to Plaintiff, any request for Declaratory Judgment, to Quiet Title to the subject property, or any other kind of "second action".

Yet, along with a judgment in her favor on the foreclosure, Defendant was given a decree that she now holds title to the mortgaged property free and clear. (A. 20)

The trial court was misguided and overstepped in several respects. M. R. Civ. P. § 6206 requires a finding that "nothing is due on the mortgage". As we know, the mortgage is, and remains *unpaid.* Certainly this Defendant is not the first to contend that a favorable foreclosure verdict is "equivalent" to a satisfaction. In *Pushard v. Bank of America, N.A.*, 2017 ME 230 ¶ 16, 175 A.3d 103, the non-paying borrowers contended that they were entitled to damages for the failure of the bank to discharge the mortgage, contending that their verdict at foreclosure was the equivalent of

satisfaction. Therein, this Court disposed of that argument as follows:

> In order for the Pushards to be entitled to relief pursuant to section 551, therefore, we would need to hold that they have "full[y] perform[ed] ... the conditions of the mortgage," 33 M.R.S. § 551, even though they have not made monthly payments as required by the mortgage. This would be an illogical result. (citation omitted) The judgment in the Pushards' favor in the Bank's foreclosure action established that the Bank was not entitled to a foreclosure judgment; it did not establish that the Pushards had fully performed the conditions of the mortgage. The trial court did not err by granting the Bank's motion for summary judgment on the Pushards' section 551 claim.

Pushard, id at ¶12 reinforced the requirement of a second action when this Court observed:

> [¶ 12] The Bank relies on our decisions in recent cases in which the parties disputed whether a judgment in the mortgagor's favor would bar a future foreclosure action based on principles of res judicata, but in each case we concluded that that issue did not present a justiciable controversy because no second action had yet been filed. See *U.S. Bank, N.A. v. Tannenbaum*, 2015 ME 141, ¶ 6 n.3, 126 A.3d 734;

> *Wells Fargo Bank, N.A. v. Girouard,* 2015 ME 116, ¶ 10, 123 A.3d 216.8 Our holdings in those cases do not determine the result here because this case comes to us in a different posture. Although, as in *Girouard* and *Tannenbaum*, the Bank has not filed a second foreclosure action, there does exist a second action—the Pushards' action against the Bank—that presents a live controversy.

Non-paying borrowers even in situations without sanctionable conduct or significant mistakes by lenders will likely wonder, "Why bother? *Stare decisis* and *res judicata* dictate that we should get our free house now!" That's what this trial court's decree does.

Respectfully, the matters before the trial Court consisted solely of a foreclosure action without a counterclaim. The nature and extent of other possible claims arising out of the relationship of this borrower and lender were not before the trial court, and are not part of this record.

If and when a second action is ever filed, Plaintiff here would have due process rights as well as substantive rights. Those rights will or may consist of counterclaims, equitable defenses, offsets, and perhaps a different and more persuasive approach to issues in

some of the areas the banks in the *Deschaine* and *Pushard* cases missed.

These challenging matters will continue to evolve, with mostly non-paying borrowers on one side, and what have become several generations removed victims of the securitizers whose avarice caused the havoc this court lamented in *Homeward Residential, Inc. v. Gregor*, 2015 ME 108 ¶12, 122 A. 3d 947[5] on the other.

The trial court overreached. The decree awarding free-and-clear title constituted a separate and distinct error requiring reversal.

[5] Ironically it was the *undersigned* who lamented that we had "lost our way". Perhaps at oral argument on this matter, that paragraph might merit completion (after a seven year *caesura).*

3) THE TRIAL COURT ERRED IN ITS SUA SPONTE CONSIDERATION OF STANDING

STANDARD OF REVIEW – ABUSE OF DISCRETION

A) This was a single ground MSJ brought by a Defendant, rather than a Plaintiff in a foreclosure action. Plaintiff neither sought a Summary Judgment, nor did it address any element of the case in its responding papers other than the ones dealing with the criticized §6111 Notice.

With no advance notice of any kind whether via the convening of a hearing, and Order to Show Cause, or a request for supplemental briefs; the trial court made *sua* sponte findings (at A. 18-19) as to the state of the record concerning the Quitclaim Assignment (A. 66) in the trial Court's November 24th Order.

Certainly the issue of standing is pertinent in all foreclosure cases, but the context of these particular findings in this particular order is concerning. Again, Plaintiff was not seeking judgment, only a trial.

This issue is being addressed in an abundance of caution, and so as to not waive rights to argue issues not developed within the brief. If, as Appellant believes, the Summary Judgment will be

reversed, the parties are left with the finding made by the trial court concerning standing.

On remand, Plaintiff believes it is entitled to proffer evidence not before the trial Court concerning standing to foreclose, particularly addressing the "findings" contained within the trial Court's footnote 7. (A. 18-19).

Because standing is a jurisdictional issue and can be raised at any time, Appellant notes that at the time the findings regarding standing were being made by the trial Court, Plaintiff's Motion to Dismiss *without prejudice* was still pending.

As we see in the standing cases such *as U.S. Bank Nat. Ass'n v. Curit*, 2016 ME 17, 131 A.3d 903; *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, 122 A. 3d 947; and *Bank of America, N.A. v. Greenleaf (Greenleaf II),* 2015 ME 127,124 A.3d 1122, the appropriate disposition for a foreclosure matter where Plaintiff lacks standing, absent sanctionable conduct is a Dismissal *without prejudice.*

If Plaintiff indeed lacked or lacks standing, the then pending Motion to Dismiss without prejudice should have been granted, or the Court should have dismissed the matter without prejudice on

its own. The issue of costs and fees could have been ordered paid as a condition of the dismissal, as was within the trial court's power to do.

E. CONCLUSION

For all the reasons contained and argued herein, Appellant J. P. Morgan Acquisition Corp. respectfully requests this Honorable Court to:

1) REVERSE the Judgment of the trial court herein and REMAND this matter for trial;

2) Alternatively to REVERSE the Judgment of the Trial Court herein and REMAND this matter with instruction to conduct a hearing regarding whether Plaintiff had or has standing to foreclose, and if not, to enter a DISMISSAL WITHOUT PREJUDICE;

3) Alternatively to REVERSE the Judgment of the trial court and REMAND with instructions to STRIKE the portion of the Judgment entered awarding Defendant title to the subject property unencumbered by the mortgage;

4) To Award Appellant fees and costs on appeal on such terms as may be just and proper; and

5) For such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

DATED: April 8, 2022

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